IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 11.8.2006

CORAM:

THE HONOURABLE MR.JUSTICE M.THANIKACHALAM

SECOND APPEAL No.2208 OF 2003

1.B.C.Muralikrishna
2.Jayalakshmi Ammal
3.K.R.devaki
4.M.P.Lokamma ... Appellants/Defendants 7 to 10

Vs.

1.B.Venugopal Chetty
2.B.M.Adiseshaiah Chetty
3.B.Varadharajulu Chetty
4.Venkataramanujulu Chetty
5.Kuppusamy
minor represented by his father
and natural guardian
Adiseshaiah Chetty
6.Padmavathy Ammal ... Respondents/Plaintiff,
Defendants 1 to 4 & 11

* * *

Second Appeal preferred under Section 100 CPC as against the judgment and decree dated 23.6.2003 rendered in A.S.No.145 of 2002 by the learned VI Additional Judge, City Civil Court, Chennai, thereby confirming the judgment and decree dated 27.11.2000 rendered in O.S.No.4963 of 1982 by the learned V Assistant Judge, City Civil Court, Chennai.

* * *

For appellants : Mr.Ashok Menon for
M/s.Menon&Goklany Associates

For R.1 : Mrs.K.M.Valsala for
Mr.K.S.Kumar

R.2 to R.6 : Not ready in notice

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JUDGMENT

Defendants 7 to 10, who are the legal representatives of the deceased 6th defendant in O.S.No.4963 of 1982 on the file of the V Assistant Judge, City Civil Court, Chennai, are the appellants.

2. The parties are referred to as per their ranking in the original suit.

3. One Munusamy Chetty had four sons, viz. Adiseshaiah Chetty (first defendant), Tandavakrishnan (deceased), Narayanasamy (fifth defendant), whose legal representative is the 11th defendant/sixth respondent, and Chinnasamy (sixth defendant), whose legal representatives are defendants 7 to 10/appellants. The first defendant Adiseshaiah Chetty had two wives. While the plaintiff and the second defendant are the sons of Adiseshaiah through his first wife, the defendants 3 and 4 are his sons through his second wife.

4. The suit property originally belonged to Munusamy Chetty and the same was inherited by his sons on his death on 3.9.1937 and therefore, the suit property is the ancestral joint family property. The plaintiff and the defendants are the members of un-divided Hindu joint family and they are the co-parceners. On 9.9.1940, Tandavakrishna, who had 1/4th share in the suit property, relinquished his share for the benefit of other co-parceners. After the said relinquishment, the defendants 1,5 and 6 were each entitled to 1/3rd share right and interest in the said co-parcenary property, which is described in schedule 'B'.

5. Muthiyalamma, wife of Munusamy Chetty, who has no right in the co-parcenery property, appears to have executed a settlement deed on 15.9.1967 in favour of defendants 1,5 and 6, which is not valid and binding. Though the members of the joint family are living separately for the sake of convenience, the suit property continued to belong to the said joint family, in which the plaintiff is entitled to 1/5th share, out of the 1/3rd share inherited by Adiseshaiah.

6. The defendants 1,5 and 6 collusively and with fraudulent intention to defraud the plaintiff's legitimate share in the co-parcenery property, without his concurrence and knowledge, have brought about a partition deed dated 19.9.1981, under which the first defendant appears to have alienated 1/15th share of the undivided share of the plaintiff, without any authority and received an inadequate compensation, in the name of owelty. The plaintiff is not a party to the said partition and the same is void in law, not binding upon him. Under the partition, the rights given to the 6th defendant is void *ab initio* and therefore, the plaintiff is entitled to 1/15th share. The 6th defendant, who is residing in the joint

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family property, managing and collecting the rents, is liable to answer the claim of the plaintiff, for income. On the above said basis, the plaintiff had filed the suit for partition and separate possession of his 1/15th share in the 'B' schedule property.

7. The first defendant, the father of the plaintiff, denying the allegations in the plaint, would contend that the suit property originally belonged to his father Munusamy Chetty, as his self-acquired property, which devolved upon the widow Muthyalamma and four sons of Munusamy Chetty on his death; that the plaintiff is not entitled to claim any share, labeling the property as 'co-parcenery property'; that Tandavakrishna executed a release deed in favour of his mother and brothers; that Muthyalamma settled her share in the property in favour of defendants 1, 5 and 6 and thus this property is the separate property of defendants 1,5 and 6; that if at all, the plaintiff would be entitled to 1/25th share and not 1/15th share; that this defendant, as father and manager, effected partition of the property, on 19.9.1981, that too with the concurrence and knowledge of the plaintiff; that the value of the entire house was determined at Rs.90,000/=, and the 6th paid an aggregate sum of Rs.30,000/= each to this defendant and to the 5th defendant, out of which this defendant tendered a sum of Rs.3,600/= to the plaintiff, being the share of the plaintiff in the suit property, which was refused; that the suit filed, without the relief of declaration, for setting aside the partition, is not maintainable and if at all the plaintiff is entitled only to owelty of Rs.3,600/=.

8. The defendants 5,6 and 7, though filed separate written statements, they have taken the same stand as that of the first defendant, praying that the suit may be dismissed with costs.

9. Based upon the pleadings, framing necessary issues, the trial Court proceeded with the trial. The evidence adduced on either side brought to surface, according to the assessment of the learned trial Judge, that

i) the plaintiff is entitled to 1/15th share;

ii) that the partition dated 19.9.1981 is not binding upon the plaintiff, since he is not a party to the said partition document;

iii) that in view of the fact, that the partition deed is not binding and in view of the proved fact that the suit property belongs to joint family, the plaintiff is entitled to 1/15th share therein; and

iv) that in order to preserve the property, the plaintiff is also entitled to an order of injunction.

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Thus deducing the decision, a preliminary decree came to be passed, declaring the plaintiff's share, granting injunction also, as per the judgment dated 27.11.2000, which was challenged by the appellants/defendants 7 to 10/legal representatives of the deceased 6th defendant in A.S.No.145 of 2002 on the file of the VI Additional Judge, City Civil Court, Chennai.

10. The learned first appellate Judge, by going through the judgment of the trial Court, re-assessing the evidence and other materials, came to the conclusion, that though the first defendant is competent to effect division of the property as the 'kartha' of the joint family, the partition is unfair, since the property would be wroth about Rs.5 lakhs or so at the time of the division, in 1981; that in view of the fact, that the plaintiff is not the party to the partition deed, it need not be set aside. In this view of the matter, the learned first appellate Judge dismissed the appeal, as per the judgment dated 23.6.2003, which is under challenge in this Second Appeal.

11. This Court, while admitting the Second Appeal, had formulated the following Substantial Questions of Law, for determination of the Second Appeal:

1. Whether the learned lower appellate Court Judge had over-looked that the first defendant being the kartha of his branch, was fully entitled to deal with the property in whatever manner he deemed fit and the plaintiff could not question of the same?

2. Whether the learned lower appellate Court Judge had erred in overlooking that the plaintiff not having challenged Ex.A.4 dated 19.9.1981 in a Court of Law at the earliest possible point of time, was not bound by the same and could not maintain O.S.No.4963 of 1982?"

12. Heard Mr.Ashok Menon, the learned counsel for the appellants and Mrs.K.M.Valsala, the learned counsel for the first respondent/plaintiff.

13. The subject matter of the suit for partition is a house and ground premises bearing Door No.42, situated at Edapayalam Street, Park Town, Madras, measuring an extent of 1,580 sq.ft. Admittedly, this property was purchased by one Munusamy Chetty, the paternal grand father of the plaintiff on 2.1.1935. It is also an admitted fact that the said Munusamy, the original owner of the property, died intestate on 9.3.1937 leaving behind his wife Muthyalamma and four sons viz. defendants 1,5,6 and one Tandavakrishna.

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14. One of the sons of Munusamy Chetty by name Thandavakrishnan had executed a release deed in favour of other co-parceners on 9.9.1940, under Ex.A.2. On 15.9.1967, Muthyalamma also settled or relinquished her right in favour of other sons, under Ex.A.3. On the above said basis, the plaintiff claims that the first defendant was entitled to 1/3rd share, in which he is entitled to 1/5th share i.e. 1/15 share since Adiseshaiah is having three other sons and therefore, he, along with his father and three brothers, is entitled to equal share of 1/5 in 1/3rd share of his father.

15. Both the Courts below have concurrently held, that in view of the release deed or the settlement deed, as the case may be, executed by Tandavakrishna and Muthyalamma, the first defendant is entitled to 1/3rd share in the suit property, which share is not challenged, though the defendants had agitated that the plaintiff, if at all, is entitled to only 1/25th share. Therefore, it is unnecessary for this Court, at present, to go into detail about the release deed or settlement deed executed by other sharers. Thus having settled, the first defendant was entitled to 1/3rd share in the suit property, we have to see, whether the plaintiff is entitled to a preliminary decree for 1/15th share in the suit property or 1/25th share.

16. It is an admitted position that the defendants 1,5 and 6 have entered into a partition on 19.9.1981 under Ex.A.4, under which, it was agreed between the sharers that since the suit property cannot be partitioned effectively, considering the very small dimension of 1,500 sq.ft. with a breadth of 23 feet East-West on the southern side and 25 feet East-West on Northern side with an old building, which is in a dilapidated condition, to fix the value of the building and the person who takes the property should pay the other sharers the value of the property as owelty according to their shares. Accordingly, the first defendant and 5th defendant have received Rs.30,000/= each from the 6th defendant Chinnasamy, thereby making him the absolute owner of the property. True, in the partition, the plaintiff is not a party, though he was a major co-parcenery or joint family member. But, as the eldest member of the family, as well as being 'kartha' of the joint family, the first defendant and his brothers have entered into a partition and divided the suit property. Therefore, we have to see, whether this partition deed is valid and binding upon the plaintiff. If the partition deed is valid, in the sense, that the fist defendant has the right to effect the partition, then the same would be binding upon the plaintiff, though he is not a party to the document, since law is well settled that the manager of the joint family or the 'kartha' of the joint family could effect a valid partition, even without the consent of co-parcenery or the joint family member, though major.

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17. The learned counsel appearing for the appellants would contend that the 'kartha' of the family, has the power under Hindu Law to effect a division of the joint family property, even without the consent of other co-parcener and therefore, ordinarily, the said partition cannot be disturbed, unless it is shown that while exercising the power vested on the 'kartha' of the family, he had acted detrimental to the sharers or effected an unequal or unfair partition, the partition cannot be set aside by the affected co-parcener viz. the plaintiff in this case. In aid, a Division Bench Ruling of this Court in GURUSAMY NAICKER AND OTHERS vs. G.JAYARAMAN AND OTHERS [(1995) II M.L.J. 549], is sought for, wherein this Court, as seen from Paragraphs 18 and 20 of the judgment, has held:

> "The power is there on the karta of the family to effect such partition even without the consent of the other co-parceners. But, it must be stated that if the said power is exercised by the father results in unequal or unfair partition, it could be set aside by the affected co-parcener.... Partitions effected by the Karta of the family cannot be, absolute terms, branded as not valid. In other words, if they are otherwise just and fair, they would be valid partitions."

On the basis of the above principle alone, Ex.A.4 partition has to be decided.

18. Responding to the above submissions, made on behalf of the learned counsel for the appellants/defendants 7 to 10, it was urged on behalf of the first respondent/plaintiff that the partition effected under Ex.A.4 is unfair and at no point of time, the father has informed about the partition, either prior to or subsequent to the partition, and in fact, the legitimate share, which the plaintiff is entitled to, was also not paid and in this view, he would further urge that Ex.A.4 should go and the consequential effect must be, the share of the plaintiff, in the suit property, has to be declared. By going through the pleadings as well as the oral evidence adduced on either side, I am unable to affix my seal of approval to the said contention raised on behalf of the first respondent/plaintiff and in fact, I should conclude, Ex.A.4 is valid, even binding upon the plaintiff, which was not properly considered or conceded by the Courts below, though they have reached concurrent findings, in my considered opinion, perversely, not assessing the question of law involved in this case properly. To test the fairness of Ex.A.4, we have to see the pleadings and the evidence also, to some extent.

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19. The plaintiff challenges the partition deed dated 19.9.1981, on the ground, as seen from paragraph 8 of the plaint, that his concurrence was not obtained and the document was brought about as fraudulent, colourable partition. It is also further stated, vaguely, that the plaintiff has not authorised the first defendant and the first defendant had no authority to receive an inadequate compensation in the name of owelty. The plaintiff is the son, though through the first wife, of the first defendant. Therefore, ordinarily, in the mind of the father, there may not be any ill-will to defraud the share of the eldest son and no reason is also assigned, on the part of the plaintiff, as to why the father should act or acted in fact, against the interest of the plaintiff. Except the above said allegations in paragraph No.8 of the plaint, I do not find any other grounds to challenge or set aside the partition dated 19.9.1981 as invalid or not binding. Because of the settled position, as pointed out supra, the first defendant, being the 'kartha' i.e. the Manager of the joint family, is competent to effect the division of the property and in this way, he along with his two brothers effected division, in which there cannot be any illegality.

20. The property appears to have been purchased, on 2.1.1935, by Munusamy Chetty and it is more or less above half ground in extent. In the partition itself, the brothers have made it very specific, that because of the small dimension, it may not be possible to enjoy the property, if it is divided by metes and bounds, that too, considering its old and dilapidated condition. I do not find any reason to discard the condition of the building described in Ex.A.4. In the year 1981, if the property is worth several lakhs of rupees, as claimed by the plaintiff, nothing would have prevented the plaintiff to plead and prove the same, thereby demonstrating, Ex.A.4 must be an unequal partition, not intended for the benefit of other sharers, including the plaintiff, who is also a co-parcener. As stated above, the plaint is elegantly silent, except saying inadequate compensation, what would be the value of the property in 1981 and in spite of that, how the first defendant had agreed to receive Rs.30,000/= towards his share, which includes the share of the plaintiff also. Thus, in the absence of any pleadings, regarding the value of the property, it is not possible to say, that it is an unequal partition or unfair partition or the 'kartha' acted against the interest of the co-parceners. If the partition, effected by the 'kartha' of the family, is to be held as unequal or unfair or that the power exercised by the 'kartha' resulted in this kind of document, there must be pleading, supported by evidence, which are absent in this case.

21. The plaintiff, who has been examined as P.W.1 also, failed to speak about the value of the building in the year 1981. In fact, as P.W.1, he has not challenged the partition deed on the ground of

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inadequacy of compensation, whereas the evidence would disclose that the father had no authority to effect the partition and in fact, the partition deed was not given effect to, which appears to be incorrect, in view of the pleadings available in the plaint.

22. In the plaint, in paragraph No.10, it is stated that the 6th defendant is residing in the property and he is also collecting rents from the tenants. Thus, the fact remains, as per the averments in paragraph No.10 of the plaint, the 6th defendant is enjoying the property. Under Ex.A.4, the entire property was given to 6th defendant and the other brothers viz. defendants 1 and 5 had received owelty of Rs.30,000/= each and they have also acknowledged the payment in the deed itself, which is reiterated in the written statement also. Therefore, it should be concluded, unhesitatingly, that Ex.A.4 partition was also given effect to.

23. It is also admitted by P.W.1, in the cross-examination, that after Ex.A.4, the first defendant had sent a sum of Rs.3,600/= towards his share, which was refused by him, thereby showing the parties to the document have acted upon, thereby giving effect to Ex.A.4 also. Only in the cross-examination, an attempt is made by P.W.1, to say that though in Ex.A.4, the value of the property is given as Rs.90,000/=, at the relevant period, the property was worth Rs.5 lakhs in the year 1981, for which there is no plea and also no supportive evidence.

24. The 7th defendant, who is the legal representative of the 6th defendant, has stated that as per the document, the value of the property was fixed at Rs.90,000/=. It is not even suggestively denied, that the property is under-valued or the property worth of Rs.5 lakhs was taken by the 6th defendant, paying a paltry sum of Rs.60,000/= to the other brothers. Thus, viewing the case from all probable and possible angles, I should say, that the plaintiff has failed to plead and prove, how the joint family manager has no authority to effect partition or how the partition, effected by the 'kartha' of the joint family, is invalid under law. The fact, that the plaintiff is not a party to the document, alone, cannot be the reason to ignore the partition, as stated by the Division Bench of this Court, in the judgment cited supra, and no contra decision is brought to my notice by the first respondent/plaintiff to invalidate the document viz. Ex.A.4, as if the first defendant has no right to effect the partition.

25. In view of my findings supra, the suit property is not available for partition and therefore, as such, the suit for partition is not maintainable. It is an admitted position, the plaintiff was entitled to some share, whether it is 1/15 or 1/25, as the case may be and the question is where he should go for claiming the said share. Because of the owelty received by the 'kartha' of

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the plaintiff's branch, if at all, he has to proceed, for his share in the money received by his father, and not against the property, which must be in the hands of his father, if he is alive.

26. For the foregoing reasons, I am of the considered opinion that both the Courts below, have overlooked the fact that the first defendant being the 'kartha' of his branch, was competent to deal with the property in this case viz. effecting partition and the same cannot be branded as invalid, answering the substantial questions of law against the first respondent/plaintiff.

27. In the light of the above discussion, the appeal is meritorious and the same deserves acceptance.

In the result, the appeal is allowed, setting aside the decrees and judgments of both the Courts below and the suit in O.S.No.4963 of 1982 on the file of the V Assistant Judge, City Civil Court, Chennai, is dismissed.

However, considering the near relationship of the parties and the nature of the dispute, I direct the parties to bear their respective costs throughout.

Rao

Sd/
Asst.Registrar

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Sub Asst.Registrar

To

1.The VI Additional Judge,
City Civil Court, Chennai.

2.The V Assistant Judge,
City Civil Court, Chennai.

3.The Registrar,
City Civil Court, Chennai.

4.The Section Officer,
VR Section,
High Court, Madras.

2 ccs to M/s. Menon & Goklaney, Advocate, SR.36155
1 cc to Mr.K.S.Kumar, Advocate, SR.36264

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